

Virginia Administrative Code
Chapter 80
Access to Employee Exposure and Medical Records

Note: The following standard is unique for the enforcement of occupational safety and health within the Commonwealth of Virginia under the jurisdiction of the VOSH Program. The federal OSHA standard counterpart listed at 1910.1020 does not apply; it does not carry the force of law and is not printed in this volume.

16VAC25-80-10. Access to employee exposure and medical records; in general (29 CFR 1910.20).

(a) Purpose. The purpose of this chapter is to provide employees and their designated representatives a right of access to relevant exposure and medical records, and to provide representatives of the commissioner a right of access to these records in order to fulfill responsibilities under the Occupational Safety and Health Act. Access by employees, their representatives, and the commissioner is necessary to yield both direct and indirect improvements in the detection, treatment and prevention of occupational disease. Each employer is responsible for assuring compliance with this chapter, but the activities involved in complying with the access to medical records provisions can be carried out, on behalf of the employer, by the physician or other health care personnel in charge of employee medical records. Except as expressly provided, nothing in this chapter is intended to affect existing legal and ethical obligations concerning the maintenance and confidentiality of employee medical information, the duty to disclose information to a patient/employee or any other aspect of the medical-care relationship, or affect existing legal obligations concerning the protection of trade secret information.

[45 F.R. 54333, August 15, 1980.]

(b) Scope and application.

(1) This chapter applies to each general industry, maritime, and construction employer who makes, maintains, contracts for, or has access to employee exposure or medical records, or analyses thereof, pertaining to employees exposed to toxic substances or harmful physical agents.

(2) This chapter applies to all employee exposure and medical records, and analyses thereof, of employees exposed to toxic substances or harmful physical agents, whether or not the records are related to specific occupational safety and health standards.

(3) This chapter applies to all employee exposure and medical records, and analyses thereof, made or maintained in any manner, including on an in-house or contractual (e.g., fee-for-service) basis. Each employer shall assure that the preservation and access requirements of this section are complied with regardless of the manner in which records are made or maintained.

(c) Definitions.

(1) "Access" means the right and opportunity to examine and copy.

(2) "Analysis using exposure or medical records" means any compilation of data, or any research, statistical or other study based at least in part on information collected from individual employee exposure or medical records or information collected from health insurance claims records, provided that either the analysis has been reported to the employer or no further work is currently being done by the person responsible for preparing the analysis.

(3) "Designated representative" means any individual or organization to whom an employee gives written authorization to exercise a right of access. For the purposes of access to employee exposure records and analyses using exposure or medical records, a recognized or certified collective bargaining agent shall be treated automatically as a designated representative without regard to written employee authorization.

(4) "Employee" means a current employee, a former employee, or an employee being assigned or transferred to work where there will be exposure to toxic substances or harmful physical agents. In the case of a deceased or legally incapacitated employee, the employee's legal representative may directly exercise all the employee's rights under this chapter.

(5) "Employee exposure record" means a record containing any of the following kinds of information concerning employee exposure to toxic substances or harmful physical agents:

(i) environmental (workplace) monitoring or measuring, including personal, area, grab, wipe, or other form of sampling, as well as related collection and analytical methodologies, calculations, and other background data relevant to interpretation of the results obtained;

(ii) biological monitoring results which directly assess the absorption of a substance or agent by body systems (e.g., the level of a chemical in the blood, urine, breath, hair, fingernails, etc.) but not including results which assess the biological effect of a substance or agent;

(iii) material safety data sheets; or

(iv) in the absence of the above, any other record which reveals the identity (e.g., chemical, common, or trade name) of a toxic substance or harmful physical agent.

(6)(i) "Employee medical record" means a record concerning the health status of an employee which is made or maintained by a physician, nurse, or other health care personnel, or technician, including:

- (A) medical and employment questionnaires or histories (including job description and occupational exposures),
- (B) the results of medical examinations (pre-employment, pre-assignment, periodic, or episodic) and laboratory tests (including X-ray examinations and all biological monitoring),
- (C) medical opinions, diagnoses, progress notes, and recommendations,
- (D) descriptions of treatments and prescriptions, and
- (E) employee medical complaints.

(ii) "Employee medical record" does not include the following:

- (A) physical specimens (e.g., blood or urine samples which are routinely discarded as a part of normal medical practice, and are not required to be maintained by other legal requirements,
- (B) records concerning health insurance claims if maintained separately from the employer's medical program and its records, and not accessible to the employer by employee name or other direct personal identifier (e.g., social security number, payroll number, etc.), or
- (C) records concerning voluntary employee assistance programs (alcohol, drug abuse, or personal counseling programs) if maintained separately from the employer's medical program and its records.

(7) "Employer" means a current employer, a former employer, or a successor employer.

(8) "Exposure" or "exposed" means that an employee is subjected to a toxic substance or harmful physical agent in the course of employment through any route of entry (inhalation, ingestion, skin contact or absorption, etc.), and includes past exposure and potential (e.g., accidental or possible) exposure, but does not include situations where the employer can demonstrate that the toxic substance or harmful physical agent is not used, handled, stored, generated, or present in the workplace in any manner different from typical non-occupational situations.

(9) "Record" means any item, collection, or grouping of information regardless of the form or process by which it is maintained (e.g., paper document, microfiche, microfilm, X-ray film, or automated data processing).

(10) "Specific written consent"

(i) Means a written authorization containing the following:

(A) the name and signature of the employee authorizing the release of medical information,

(B) the date of the written authorization,

(C) the name of the individual or organization that is authorized to release the medical information,

(D) the name of the designated representative (individual or organization) that is authorized to receive the released information,

(E) a general description of the medical information that is authorized to be released,

(F) a general description of the purpose for the release of the medical information, and

(G) a date or condition upon which the written authorization will expire (if less than one year).

(ii) A written authorization does not operate to authorize the release of medical information not in existence on the date of written authorization, unless this is expressly authorized, and does not operate for more than one year from the date of written authorization.

(iii) A written authorization may be revoked in writing prospectively at any time.

(11) "Toxic substance or harmful physical agent" means any chemical substance, biological agent (bacteria, virus, fungus, etc.), or physical stress (noise, heat, cold, vibration, repetitive motion, ionizing and non-ionizing radiation, hypo- or hyperbaric pressure, etc.) which:

(i) is regulated by a Federal law or rule due to a hazard to health,

(ii) is listed in the latest printed edition of the National Institute for Occupational Safety and Health (NIOSH) Registry of Toxic Effects of Chemical Substances (RTECS) (See Appendix B),

(iii) has yielded positive evidence of an acute or chronic health hazard in human, animal, or other biological testing conducted by, or known to, the employer, or

(iv) has a material safety data sheet available to the employer indicating that the material may pose a hazard to human health.

(d) Preservation of records.

(1) Unless a specific occupational safety and health standard provides a different period of time, each employer shall assure the preservation and retention of records as follows:

(i) Employee medical records. Each employee medical record shall be preserved and maintained for at least the duration of employment plus 30 years, except that health insurance claims records maintained separately from the employer's medical program and its records need not be retained for any specified period;

(ii) Employee exposure records. Each employee exposure record shall be preserved and maintained for at least 30 years, except that:

(A) background data to environmental (workplace) monitoring or measuring, such as laboratory reports and worksheets, need only be retained for one year so long as the sampling results, the collection methodology (sampling plan), a description of the analytical and mathematical methods used, and a summary of other background data relevant to interpretation of the results obtained, are retained for at least 30 years; and

(B) material safety data sheets and (c)(5)(iv) records concerning the identity of a substance or agent need not be retained for any specified period as long as some record of the identity (chemical name if known) of the substance or agent, where it was used, and when it was used is retained for at least 30 years; and

(iii) Analyses using exposure of medical records. Each analysis using exposure or medical records shall be preserved and maintained for at least 30 years.

(2) Nothing in this chapter is intended to mandate the form, manner, or process by which an employer preserves a record so long as the information contained in the record is preserved and retrievable, except that X-ray films shall be preserved in their original state.

(e) Access to records.

(1) General.

(i) Whenever an employee or designated representative requests access to a record, the employer shall assure that access is provided in a reasonable time, place, and manner, but in no event later than 15 days after the request for access is made.

(ii) Whenever an employee or designated representative requests a copy of a record, the

employer shall, within the period of time previously specified, assure that either:

(A) a copy of the record is provided without cost to the employee or representative,

(B) the necessary mechanical copying facilities (e.g., photocopying) are made available without cost to the employee or representative for copying the record, or

(C) the record is loaned to the employee or representative for a reasonable time to enable a copy to be made.

(iii) Whenever a record has been previously provided without cost to an employee or designated representative, the employer may charge reasonable, non-discriminatory administrative costs (i.e., search and copying expenses but not including overhead expenses) for a request by the employee or designated representative for additional copies of the record, except that

(A) an employer shall not charge for an initial request for a copy of new information that has been added to a record which was previously provided; and

(B) an employer shall not charge for an initial request by a recognized or certified collective bargaining agent for a copy of an employee exposure record or an analysis using exposure or medical records.

(iv) Nothing in this chapter is intended to preclude employees and collective bargaining agents from collectively bargaining to obtain access to information in addition to that available under this chapter.

(2) Employee and designated representative access.

(i) Employee exposure records. Each employer shall, upon request, assure the access of each employee and designated representative to employee exposure records relevant to the employee. For the purpose of this chapter, exposure records relevant to the employee consist of:

(A) records of the employee's past or present exposure to toxic substances or harmful physical agents,

(B) exposure records of other employees with past or present job duties or working conditions related to or similar to those of the employee,

(C) records containing exposure information concerning the employee's workplace or working conditions, and

(D) exposure records pertaining to workplaces or working conditions to which the employee is being assigned or transferred.

(ii) Employee medical records.

(A) Each employer shall, upon request, assure the access of each employee to employee medical records of which the employee is the subject, except as provided in subsection (e)(2)(ii)(D) below.

(B) Each employer shall, upon request, assure the access of each designated representative to the employee medical records of any employee who has given the designated representative specific written consent. Appendix A to this chapter contains a sample form which may be used to establish specific written consent for access to employee medical records.

(C) Whenever access to employee medical records is requested, a physician representing the employer may recommend that the employee or designated representative:

(1) consult with the physician for the purposes of reviewing and discussing the records requested,

(2) accept a summary of material facts and opinions in lieu of the records requested, or

(3) accept release of the requested records only to a physician or other designated representative.

(D) Whenever an employee requests access to his or her employee medical records, and a physician representing the employer believes that direct employee access to information contained in the records regarding a specific diagnosis of a terminal illness or a psychiatric condition could be detrimental to the employee's health, the employer may inform the employee that access will only be provided to a designated representative of the employee having specific written consent, and deny the employee's request for direct access to this information only. Where a designated representative with specific written consent requests access to information so withheld, the employer shall assure the access of the designated representative to this information, even when it is known that the designated representative will give the information to the employee.

(E) Nothing in this chapter precludes a physician, nurse, or other responsible health care personnel maintaining employee medical records from deleting from

requested medical records the identity of a family member, personal friend, or fellow employee who has provided confidential information concerning an employee's health status.

(iii) Analyses using exposure or medical records.

(A) Each employer shall, upon request, assure the access of each employee and designated representative to each analysis using exposure or medical records concerning the employee's working conditions or workplace.

(B) Whenever access is requested to an analysis which reports the contents of employee medical records by either direct identifier (name, address, social security number, payroll number, etc.) or by information which could reasonably be used under the circumstances indirectly to identify specific employees (exact age, height, weight, race, sex, date of initial employment, job title, etc.), the employer shall assure that personal identifiers are removed before access is provided. If the employer can demonstrate that removal of personal identifiers from an analysis is not feasible, access to the personally identifiable portions of the analysis need not be provided.

(3) OSHA access.

(i) Each employer shall, upon request, assure the immediate access of representatives of the Commissioner of the Department of Labor and Industry to employee exposure and medical records and to analyses using exposure or medical records. Rules of agency practice and procedure governing OSHA access to employee medical records are contained in 29 CFR 1913.10.

(ii) Whenever VOSH seeks access to personally identifiable employee medical information by presenting to the employer a written access order pursuant to 29 CFR 1913.10(d), the employer shall prominently post a copy of the written access order and its accompanying cover letter for at least 15 working days.

(f) Trade secrets.

(1) Except as provided in paragraph (f)(2) of this section, nothing in this section precludes an employer from deleting from records requested by an employee or designated representative any trade secret data which discloses manufacturing processes, or discloses the percentage of a chemical substance in a mixture, as long as the employee or designated representative is notified that information has been deleted. Whenever deletion of trade secret information substantially impairs evaluation of the place where or the time when exposure to a toxic substance or harmful physical agent occurred, the employer shall provide alternative

information which is sufficient to permit the employee to identify where and when exposure occurred.

(2) Notwithstanding any trade secret claims, whenever access to records is requested, the employer shall provide access to chemical or physical agent identities including chemical names, levels of exposure, and employee health status data contained in the requested records.

(3) Whenever trade secret information is provided to an employee or designated representative, the employer may require, as a condition of access, that the employee or designated representative agree in writing not to use the trade secret information for the purpose of commercial gain and not to permit misuse of the trade secret information by a competitor or potential competitor of the employer.

(g) Employee information.

(1) Upon an employee's first entering into employment, and at least annually thereafter, each employer shall inform employees exposed to toxic substances of harmful physical agents of the following:

- (i) the existence, location, and availability of any records covered by this section;
- (ii) the person responsible for maintaining and providing access to records; and
- (iii) each employee's rights of access to these records.

(2) Each employer shall make readily available to employees a copy of this chapter and its appendices, and shall distribute to employees any informational materials concerning this chapter which are made available to the employer by the Commissioner of the Department of Labor and Industry.

(h) Transfer of records.

(1) Whenever an employer is ceasing to do business, the employer shall transfer all records to this section to the successor employer. The successor employer shall receive and maintain these records.

(2) Whenever an employer is ceasing to do business and there is no successor employer to receive and maintain the records subject to this chapter, the employer shall notify affected employees of their rights of access to records at least 3 months prior to the cessation of the employer's business.

(3) Whenever an employer either is ceasing to do business and there is no successor employer to receive and maintain the records, or intends to dispose of any records required to be preserved for at least 30 years, the employer shall:

(i) transfer the records to the Director of the National Institute for Occupational Safety and Health (NIOSH) if so required by a specific occupational safety and health standard; or

(ii) notify the Director of NIOSH in writing of the impending disposal of records at least 3 months prior to the disposal of the records.

(4) Where an employer regularly disposes of records required to be preserved for at least 30 years, the employer may, with at least 3 months notice, notify the Director of NIOSH on an annual basis of the records intended to be disposed of in the coming year.

(i) Appendices. The information contained in the Appendices to this chapter is not intended, by itself, to create any additional obligations not otherwise imposed by this chapter nor detract from any existing obligation.

(j) Effective date. This section shall become effective on August 21, 1980. All obligations of this chapter commence on the effective date except that the employer shall provide the information required under paragraph (g)(1) of this section to all current employees within 60 days after the effective date.

Statutory Authority

' 40.1-22(5) of the Code of Virginia.

Historical Notes

Eff. May 1, 1981.

Cross References

VOSH Administrative Regulations Manual provisions respecting access to employee exposure and medical records, 16VAC25-60-80.

APPENDIX A. Sample authorization letter for the release of employee medical record information to designated representative.

I, _____ (full name of worker/patient) hereby authorize _____ (individual or organization holding the medical records) to release to _____ (individual or organization authorized to receive the medical information), the following medical information from my personal medical records:

(Describe generally the information desired to be released).

I give my permission for this medical information to be used for the following purpose:

_____, but I do not give permission for any other use or re-disclosure of this information.

(Note. - Several extra lines are provided below so that you can place additional restrictions on this authorization letter if you want to. You may, however, leave these lines blank. On the other hand, you may want to (1) specify a particular expiration date for this letter (if less than one year); (2) describe medical information to be created in the future that you intend to be covered by this authorization letter; or (3) describe portions of the medical information in your records which you do not intent to be released as a result of this letter.)

Full name of Employee or Legal Representative

Signature of Employee or Legal Representative

Date of Signature

APPENDIX B. Availability of NIOSH Registry of Toxic Effects of Chemical Substances (RTECS)¹

The final standard, 29 CFR 1910.20, applies to all employee exposure and medical records, and analyses thereof, of employees exposed to toxic substances or harmful physical agents (paragraph (b)(2)). The term "toxic substance or harmful physical agent" is defined by paragraph (c)(11) to encompass chemical substances, biological agents, and physical stresses for which there is evidence of harmful health effects. The standard uses the latest printed edition of the National Institute for Occupational Safety and Health (NIOSH) Registry of Toxic Effects of Chemical Substances (RTECS) as one of the chief sources of information as to whether evidence of harmful health effects exists. If a substance is listed in the latest printed RTECS, the standard applies to exposure and medical records (and analyses of these records) relevant to employees exposed to the substance.

It is appropriate to note that the final standard does not require that employers purchase a copy of RTECS, and many employers need not consult RTECS to ascertain whether their employee exposure or medical records are subject to the standard. Employers who do not currently have the latest printed edition of the NIOSH RTECS, however, may desire to obtain a copy. The RTECS is issued in an annual printed edition as mandated by section 20(a)(6) of the Occupational Safety and Health Act (29 USC ' 669(a)(6)). The 1978 edition is the most recent

printed edition as of May 1, 1980. Its Foreword and Introduction describes the RTECS as follows:

"The annual publication of a list of known toxic substances is a NIOSH mandate under the Occupational Safety and Health Act of 1970. It is intended to provide basic information on the known toxic and biological effects of chemical substances for the use of employers, employees, physicians, industrial hygienists, toxicologists, researchers, and, in general, anyone concerned with the proper and safe handling of chemicals. In turn, this information may contribute to a better understanding of potential occupational hazards by everyone involved and ultimately may help to bring about a more healthful workplace environment." (p. iii)

"This Registry contains 124,247 listings of chemical substances: 33,929 are names of different chemicals with their associated toxicity data and 90,318 are synonyms. This edition includes approximately 7,500 new chemical compounds that did not appear in the 1977 Registry." (p. xiii)

"The Registry's purposes are many, and it serves a variety of users. It is a single source document for basic toxicity information and for other data, such as chemical identifiers and information necessary for the preparation of safety directives and hazard evaluations for chemical substances. The various types of toxic effects linked to literature citations provide researchers and occupational health scientists with an introduction to the toxicological literature, making their own review of the toxic hazards of a given substance easier. By presenting data on the lowest reported doses that produce effects by several routes of entry in various species, the Registry furnishes valuable information to those responsible for preparing safety data sheets for chemical substances in the workplace. Chemical and production engineers can use the Registry to identify the hazards which may be associated with chemical intermediates in the development of final products, and thus can more readily select substitutes or alternate processes which may be less hazardous." (p. xiii)

"In this edition of the Registry, the editors intend to identify 'all known toxic substances' which may exist in the environment and to provide pertinent data on the toxic effects from known doses entering an organism by any route described. Data may be used for the evaluation of chemical hazards in the environment, whether they be in the workplace, recreation area, or living quarters." (p. xiii)

"It must be reemphasized that the entry of a substance in the Registry does not automatically mean that it must be avoided. A listing does mean, however, that the substance has the document potential of being harmful if misused, and care must be exercised to prevent tragic consequences." (p. xiv)

The RTECS 1978 printed edition may be purchased from the Superintendent of Documents, U.S. Government Printing Office (GPO), Washington, D.C. 20402 (202-783-3238) (Order GPO Stock No. 017-033-00346-7). The 1979 printed edition is anticipated to be issued in

the summer of 1980. Some employers may also desire to subscribe to the quarterly update to the RTECS which is published in a microfiche edition. An annual subscription to quarterly microfiche may be purchased from the GPO (Order the "Microfiche Edition, Registry of Toxic Effects of Chemical Substances"). Both the printed edition and the microfiche edition of RTECS are available for review at many university and public libraries throughout the country. The latest RTECS editions may also be examined at the OSHA Technical Data Center, Room N2439-Rear, United States Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210 (202-523-9700), or at any OSHA Regional or Area Office (See major city telephone directories under United States Government-Labor Department).

1 On April 24, 1980, the Director of the Federal Register approved for incorporation by reference into 29 CFR 1910, the 1978 edition of the National Institute for Occupational Safety and Health Registry of Toxic Effects of Chemical Substances (the Registry). See CFR 1910.20(c)(11)(ii).